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BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 235

CHICAGO & SOUTHERN AIR LINES, INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*,
RESORT AIRLINES, INC., *Intervener*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 23, 1950.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that this Court grant rehearing of its order of October 9, 1950, denying the petition for a writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-entitled case as prayed for in the petition filed August 4, 1950, herein.

JURISDICTION.

The petition for certiorari was filed on August 4, 1950, and denied on October 9, 1950. This petition for rehearing is filed within fifteen days from October 9, 1950, in accordance with Rule 33 of this Court. It is based upon intervening circumstances of substantial or controlling effect since the filing of the petition for a writ of certiorari. See *Clark* v. *Manufacturers Trust Co.*, 337 U. S. 953, 338 U. S. 241.

REASONS FOR PETITION FOR REHEARING.

Since the filing of the petition for a writ of certiorari herein the United States Court of Appeals for the Second Circuit has rendered a decision which is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in the instant case. *Trans World Airlines, Inc.* v. *Civil Aeronautics Board, et al.*, 184 F. 2d (Adv.) 66 (CA 2d, 1950). Both the instant case and the *TWA Case* involved petitions for judicial review of orders of the Civil Aeronautics Board approved by the President pursuant to Section 801 of the Civil Aeronautics Act. Both cases presented questions as to the applicability of the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948) (R. 72). In both cases it was alleged that the Board and the President had exceeded their legal powers in making the orders complained of.

In the instant case the Court of Appeals for the District of Columbia did not pass upon the merits of petitioner's contentions with respect to invalid exercise of Board and Presidential power and in a per curiam order dismissed the petition for review, citing the *Waterman Case* as precluding judicial review. On the other hand in the *TWA Case* the Court of Appeals for the Second Circuit considered the contentions made by the petitioners with respect to invalid exercise of Board and Presidential power, determined that those contentions were without merit, and concluded that the order complained of was valid. Only then did the Sec-

ond Circuit dismiss the petitions for review in accordance with this Court's decision in the *Waterman Case.*

The decision of the Court of Appeals for the District of Columbia Circuit and that of the Court of Appeals for the Second Circuit in substantially similar circumstances, thus have created a conflict between the circuits in the interpretation and application of this Court's decision in the *Waterman Case,* which conflict did not exist at the time the Petition for Certiorari was filed herein.

In one of the opening sentences of his majority opinion in the *Waterman Case* Mr. Justice Jackson stated:

> "*By proceedings not challenged as to regularity,* the Board, with express approval of the President, issued an order which denied Waterman Steamship Corporation a certificate of public convenience and necessity." 333 U. S. 105 (Italics supplied).

This language clearly implied that "challenges as to regularity" were subject to judicial review and that the immunity granted by the *Waterman Case* to joint President-Board action did not extend to a case where such joint action was invalidly exercised or where the Board and the President sought to exercise authority beyond that granted by the Civil Aeronautics Act. The Court of Appeals for the Second Circuit in the *TWA Case* adopted this interpretation of the *Waterman Case.* It first disposed of the "challenges as to regularity" before applying the *Waterman Case* and denying further judicial review.

> "For the foregoing reasons we think that the President and the Board acted within their legal powers in making the order of July 10. *If so,* the Court is without jurisdiction to review that order and the petitions for review will have to be dismissed when brought on for hearing." *Trans World Airlines, Inc.* v. *Civil Aeronautics Board, et al., supra.* (Italics supplied)

The opinion clearly states that *if the order is valid,* it is not subject to review. The converse must therefore be true,

i.e. *if the order is invalid, it is subject to review.* In either event, before the rule of the *Waterman Case* can be applied to deny judicial review, the validity of the order complained of must first be determined.

Petitioner's "challenges as to regularity", as set forth in its petition for review below, have yet to be reviewed by any court. The Court of Appeals for the District of Columbia Circuit construed the *Waterman Case* as precluding judicial review of *any* order resulting from joint President-Board action, did not dispose of the merits of the petitioner's "challenges as to regularity" and merely issued a per curiam order dismissing the petition for review upon the authority of the *Waterman Case.* The Court of Appeals for the Second Circuit construed and applied the *Waterman Case* as requiring first a determination of the validity of the "challenges as to regularity" before judicial review could be denied. To that extent the decisions of the two circuits are in direct conflict. Short of a decision by this Court no one can say with certainty whether "challenges as to regularity" of joint President-Board action in the field of international air transportation are judicially reviewable. To resolve this conflict a writ of certiorari should issue herein.

It will be noted that the Court of Appeals for the Second Circuit rendered its opinion in the *TWA Case* at an early stage of the proceedings in order to "accelerate the parties access to the Supreme Court if they are disposed to seek it." This indicates a recognition by that Court of the importance of the question presented. Counsel is advised that a petition for writ of certiorari will be filed by one of the parties in the *TWA Case* in due course.

The conflict between the circuits is one of substance and places squarely in issue the question whether the detailed standards and provisions inserted by Congress in the Civil Aeronautics Act are to be followed or may be ignored in cases requiring Presidential approval. The conflict is not one of mere technique. The decision in the *TWA Case,* by

reviewing the validity of the order complained of, provides assurance that the order issued by the Board and approved by the President is a valid one and satisfies the procedural and substantive requirements imposed by Congress in the Act. The decision of the Court below provides no such assurance. On the contrary, by failing to review the validity of the order complained of it cloaks with immunity all orders approved by the President even where the express requirements of the Act have been ignored or violated.

CONCLUSION.

For the foregoing reasons, petitioner respectfully urges that rehearing be granted; and that upon such rehearing a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ROGER J. WHITEFORD,
HUBERT A. SCHNEIDER,
PHILIP S. PEYSER,
Counsel for Petitioner.

Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

ROGER J. WHITEFORD,
HUBERT A. SCHNEIDER,
PHILIP S. PEYSER,
Counsel for Petitioner.

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On Petition for Rehearing of Order Denying Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ANSWER OF INTERVENER IN OPPOSITION.

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ANSWER OF INTERVENER IN OPPOSITION.

JURISDICTION.

The Petition for Writ of Certiorari filed by the Petitioner on August 4, 1950 was denied by this Court on October 9, 1950. Petitioner on October 23, 1950 filed a Petition for Rehearing. This response is filed within ten days of the service of the Petition for Rehearing in accordance with Rule 33 of this Court.

ARGUMENT.

Petitioner has interpreted the decision of the United States Court of Appeals for the Second Circuit in *Trans World Airlines, Inc.* v. *Civil Aeronautics Board, et al.*, 184 F. 2d 66 (C.C.A. 2nd, decided August 14, 1950) as conflicting with the *per curiam* order of the court below dismissing the Petition for Review, and now urges this alleged conflict as new grounds upon which this Court should grant the Petition for Writ of Certiorari.[1]

Intervenor submits that there is no such conflict. The court below and the court in the *TWA Case* both dismissed for lack of jurisdiction petitions for review of orders of the Civil Aeronautics Board approved by the President on the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948).

Petitioner gears its alleged conflict, however, to the fact that in the *TWA Case* the court wrote an opinion in which it "considered the contentions made by the Petitioners with respect to invalid exercise of Board and Presidential power . . . " (Petition for Rehearing, p. 2). This portion of the *TWA Case* opinion dealt, as will be shown below, with the question of whether or not there was before the court an order of the Board which was subject to Presidential approval *at all*. In the case before this Court, however, Petitioner has alleged error *only* within the ambit of an order of the Board *admittedly* subject to the approval of the President. There can be no conflict, therefore, based on the discussion of issues in the *TWA Case* which are not even raised in this case.

The *TWA Case* in the Second Circuit arose on motions for a stay pending judicial review of an order of the Civil Aeronautics Board, which had been approved by the President and which reflected a directive by him contrary to a

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[1] Intervenor cited the *TWA Case* in its Brief in Opposition to the Petition for a Writ of Certiorari (p. 6). Petitioner did not refer at all to this case in its Reply brief to the Briefs in Opposition.

recommended order of the Board. The Second Circuit held that interlocutory relief should be denied and dismissed the Petitions for Review on the grounds that it lacked jurisdiction because of the decision of this Court in the *Waterman Case,* 184 F. 2d 66, 70. In rejecting contentions in the Petitions for Review in the *TWA Case* that the initial order of the Board denying applications for approval of the transfer of a certificate and for the acquisition of assets was not subject to Presidential approval because it did not involve matters specifically falling within any of the categories set out in Section 801 of the Civil Aeronautics Act, the Court discussed the question of whether the challenged order was or was not so subject to approval by the President. Having held that it was, the court next discussed the contention that even if the initial order was subject to the approval of the President, it became finalized when signed by the President and returned to the Board with the result that the President was powerless to retract his approval and direct the Board to submit a different decision and order. The court dismissed this contention as incorrect which left before it a final order of the Board subject to the approval of, and approved by, the President to which the *Waterman Case* doctrine applied.

Thus, the court in the *TWA Case, prior* to its determination of the applicability of the *Waterman Case* doctrine considered and rejected the contention that the order in question should not have been subject to the approval of the President *at all.* Thereupon it dismissed the Petitions for Review for lack of jurisdiction in accordance with the *Waterman Case.*

In this proceeding, the court below had no cause to discuss any matter of the kind considered by the court in the *TWA Case* because here it was never contended that the order of the Board was not subject to the approval of the President. Petitioner herein merely contended that there were certain claimed defects in the Presidentially reviewable order.

Petitioner, therefore, is completely incorrect in assuming that the discussion of the Second Circuit of the question of whether an order was before it which was subject to Presidential approval conflicted with the *per curiam* order of the court below where that question never arose at all. Petitioner can only labor at establishing an alleged conflict through a series of five assumptions injected into the *Waterman Case*, the decision of the court in the *TWA Case*, and the *pro curiam* decision of the court below. Error in any one of the five assumptions destroys Petitioner's position.

(1) Petitioner has first assumed that the introductory phrase of the *Waterman Case* opinion (i.e., "By proceedings not challenged as to regularity") creates an exception to the immunity from judicial review otherwise extended by the *Waterman Case* to orders of the Board approved by the President. The dissenting opinion in the *Waterman Case* is directly contrary to this interpretation by Petitioner of the majority's language. 333 U. S. 103, 117, 118.

(2 & 3) Petitioner next assumes that the Second Circuit in the *TWA Case* "adopted" the view which Petitioner has assumed as given to this introductory phrase in the *Waterman Case* opinion, and, further, assumes that the Second Circuit considered the contentions raised in the *TWA Case* as falling within the category of such "challenges" as delineated by Petitioner. Surely, such an important interpretation of the *Waterman Case* by the Second Circuit in the *TWA Case* would have been clearly stated or at least mentioned in the opinion, if that is what was meant, yet nowhere in the extensive citation from the *Waterman Case* and the discussion thereof to be found in the opinion is there any statement to that effect.

(4) Petitioner next assumes that the nature of the contentions raised in the *TWA Case* and in this case were similar "challenges" as delineated by Petitioner. Intervenor has pointed out above that these contentions are

completely different and that the type of contentions raised in the *TWA Case* were never raised or considered in this case.

(5) Finally, to complete the alleged conflict, Petitioner assumes that the citation of the *Waterman Case* by the court below in its *per curiam* order dismissing the Petition for Review was a holding that the *Waterman Case* had been construed to exclude judicial review of *any* order of the Board approved by the President. Certainly the proper interpretation of this *per curiam* order is that the *specific* contentions which Petitioner raised below were within the scope of the immunity from judicial review extended to orders of the Board approved by the President by the *Waterman Case.*

CONCLUSION.

Intervenor submits that Petitioner's alleged conflict between the *TWA Case* and the *per curiam* order of the court below is only made possible by casuistic reasoning and a series of assumptions. An unclouded analysis of the two cases shows no conflict in their holdings, which were completely in accord in dismissing petitions for review of orders of the Board subject to Presidential approval on the authority of the *Waterman Case.* Nor is a conflict to be found in the consideration by the Second Circuit of the question of whether the order complained of was subject to Presidential review at all, since this fact was never challenged in the court below.

WHEREFORE, Intervenor, Resort Airlines, Inc., prays that this Honorable Court deny the Petition for Rehearing of the Order Denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by the Petitioner, Chicago & Southern Air Lines, Inc.

Respectfully submitted,

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Dated: October 31, 1950.